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CLASS CERTIFICATION BASED ON MERITS OF THE CLAIMS

GEOFFREY C. HAZARD, JR.*

I. INTRODUCTION

The class suit, if properly defined and implemented, continues to have great social and legal utility. For example, its use of the injunctive remedy in the field of civil rights is hardly disputable. The class suit is also a useful remedy for situations in which there are many claimants to a limited fund. However, difficulties have arisen in “(b)(3)” class suits—suits in which the claims are entirely, or primarily, for money but do not involve a limited fund.¹ Familiar examples include the attempted asbestos personal injury class suits, claims based on misrepresentation in the securities markets, suits alleging improper financial practices by financial institutions such as banks and insurance companies, and other “consumer” claims. Many consumer claims class suits arise from what can be described generically as “private toll booth” cases, in which an operator has positioned itself to realize illegal profit in hundreds or thousands of transactions with customers. Some employment discrimination cases are also claims for money, although in many employment cases an injunctive remedy is also sought.

The utility of the class suit is diminished in “mass tort” claims for personal injury and wrongful death. On one hand, when mass tort personal injury claims are numerous but individually substantial, the economics of litigation permit these claims to be initiated as individual actions. The information system concerning personal injury claims among claimants, defendants, and counsel has greatly improved, and the rules concerning solicitation have been greatly relaxed. As a consequence, these claims typically are initiated as individual actions but then aggregated through consolidation for discovery, for example, through multi-district litigation (MDL) proceedings. At some point in litigation, these aggregated cases often can be transformed into class suits for settlement purposes. Hence, the recent suggested amendment to Federal Rule of Civil Procedure 23, designed to facilitate “settlement class actions,” should be given serious consideration.²

On the other hand, many mass tort personal injury cases involve “futures,” potential claimants whose injuries have not become fully manifest. Claims of this kind present difficult issues regarding identification and proof of

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1. See FED. R. CIV. P. 23(b)(3).

2. See Judicial Conference of the United States, Committee on Practice and Procedure, proposed Rule 23(b)(4) (Aug. 2000).

causation. The decisions of the United States Supreme Court in *Amchem Products, Inc. v. Windsor*³ and *Ortiz v. Fibreboard Corp.*⁴ have cast a dark shadow over the use of class action suits when futures are involved.⁵ However, a different situation is presented when there is a significant risk that the funds available from defendants in personal injury cases will be inadequate to pay all the claimants; that is a “(b)(1)(B)” or “limited fund” situation.⁶ In a situation involving numerous claimants to a limited fund, a class suit can be justified as equally in personal injury cases—including cases involving futures—as in cases involving financial injury or consumer claims.

Over the last several decades, going back to the 1966 revision of Rule 23, there has been much political rhetoric about the damages class suit. The contending sides often seem to be talking about very different transactions. On behalf of votaries for claimants, it is asserted that wholesale rip-offs are involved, in which the defendants have unjustly enriched themselves at the expense of unprotected ordinary citizens. On behalf of defendants, it is alleged that the class suit itself is blackmail. Of course, much of this talk is simply the shield-banging media rhetoric that has become all too customary as an accompaniment to litigation involving high stakes. However, in class suit litigation, the radically different characterizations by the parties often persist even after discovery has substantially progressed. In most other types of litigation, as discovery progresses, the lawyers for the contending parties usually begin to converge their estimates of the case value. The same is not true in many consumer class suits.

II. VALUATION OF CLASS CLAIMS

Valuations converge in ordinary litigation because lawyers for the parties generally are experienced in estimating the value of specific types of claims—for example, personal injury, wrongful death, and commercial disputes. The lawyers’ analyses of value essentially involve their hypotheses about “verdict value,” whether an eventual verdict will be for the plaintiff or the defendant and, if for the plaintiff, what the amount will be. However, valuation of class claims is more difficult for, perhaps, four reasons. First, certification determines whether the lawsuit will become a class suit and,

3. 521 U.S. 591 (1997).

4. 527 U.S. 815 (1999).

5. See Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1910-16 (2000).

6. See FED. R. CIV. P. 23(b)(1)(B) (conditioning maintenance of a class action on the requirement that non-parties not be “substantially impair[ed] or impede[d in] their ability to protect their interests”). The Supreme Court considered that the situation in *Ortiz* did not involve a “limited fund” and, therefore, its decision does not apply in such a circumstance. *Ortiz*, 527 U.S. at 848. In my opinion, the Court misunderstood the underlying transaction in that case. However, the significance of the decision is determined by the facts as the Court understood them.

therefore, whether it will or will not involve a big claim. Until certification has been decided, the lawyers for the parties do not know whether they are dealing with (a) a big claim; (b) isolated claims that are nevertheless viable with each individual claim having substantial value; or (c) a multitude of small claims, which individually are practically worthless. Second, merits discovery in class suits usually is postponed until after certification, leaving information relevant to valuation unavailable in the pre-certification stage. Third, merits discovery usually is illuminating on issues concerning conflicts within the class and the need for subclasses. Finally, certification is considered with regard to factors other than the merits. Some of these factors have little or no relation to the merits—for example, the “adequacy” of the class representative (as distinct from adequacy of class counsel). Other factors among those considered at this stage, such as the degree of commonality of the claims, often are, at best, tangential to the merits. Put more bluntly, the pre-certification stage of class suits under the present Rule 23 proceeds in a cacophony of distractions from the merits and estimation of verdict value.

The underlying problem is the difficulty of establishing a reasonable valuation of the claims involved. A reasonable valuation could more readily be established—for the information of the court and both claimants and defendants—if class suit procedure would focus on two variables: first, the verdict value of the typical claims involved and, second, the number of claims that fit a description of “typicality.” Thus, if the value of the typical claim is between \$100 and \$500 and the number of these claims is between 1,000 and 2,500, the verdict value of prosecuting them as a class suit would be somewhere between \$100,000 and \$1,250,000. That range is not a zeroing in, but it can be considered near the ballpark. If the variables of claim size and number of claims are more precise than this, the economic magnitude of the case would be correspondingly more precise. Even a ballpark valuation would be less indeterminate than a range of \$0 to \$25 million.

The need to forecast an ultimate valuation prompted Judge Robert Parker to suggest a solution proposed in some of the early asbestos cases.⁷ He proposed to try a sample of claims and to project the resulting values to the class as a whole.⁸ The Fifth Circuit rejected the proposal as unwarranted by Rule 23,⁹ but that does not mean the basic idea was misguided.

III. THE PROPOSAL

I propose that class suit procedures be revised to facilitate an estimation of the two key variables—the value of each claim and the number of claims

7. See *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 665-66 (E.D. Tex. 1990). See generally *Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836 (E.D. Tex. 1980) (discussing the application of offensive collateral estoppel in asbestos products liability cases).

8. *Cimino*, 751 F. Supp. at 665-66.

9. *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

involved. The proposal is two-fold.

In negative terms, there is little to be gained by trying to refine Rule 23's explicit definitions of an appropriate class.¹⁰ These definitions include the ideas of commonality and typicality, and of appropriate representatives of a class and the adequacy of the representatives for the class.¹¹ The Advisory Committee on Civil Rules of the Judicial Conference has given some attention to refinement of these definitions but has left them largely intact. It seems to me that the concepts of "typicality" and "numerosity" are sufficiently intelligible as written formulations. The problem is not an analytic definition of the concept of "many similar claims," but a problem of evidentiary determination of whether the definitions are fulfilled in a specific case.¹²

In positive terms, consideration should be given to procedures for determining the merits of the individual claims and the size of the class *before* a suit is certified as a class suit. The basic idea is to reverse the decision in *Eisen v. Carlisle & Jacquelin*¹³ and to provide for an initial judgment on the merits of class members in relation to the claims. Difficulties involving this concept undoubtedly warrant attention, including difficulties to which I have been oblivious. However, presenting this proposal may elicit attention from the many knowledgeable lawyers and judges who have dealt with damages class suits.

The following is a preliminary statement of the proposal.¹⁴ I put it in rule form in order to be as specific as possible. This formulation presupposes continuation of Rule 23 substantially in its present form, including its rules for administering class suits. My proposal reads:

23.3 Damages Class Suits.

An action for damages to a large number of people alleged to have suffered similar injury may be maintained as provided in this Rule.

(a) Such an action may be maintained when the requirements of Rule 23(a) are satisfied, and either:

(1) the claims of all or most members of the class, a "consumers class action," are so small that it would be impractical to prosecute them through separate actions, and the validity of typical claims is established as provided in paragraph (b) of this Rule; or

10. See FED. R. CIV. P. 23(a).

11. *Id.*

12. Cf. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982) (discussing how the commonality, typicality, and adequacy of the representative party requirements in Rule 23 may merge when determining whether a class action suit would be beneficial).

13. 417 U.S. 156, 177 (1974); see *infra* Part IV.

14. If adopted, Rule 23 of the Federal Rules of Civil Procedure would be amended accordingly. For present purposes I assume that "(b)(1)" and "(b)(2)" class suits would be left alone. Obviously, a boundary problem between these categories and the proposed damages class suit would exist. However, these boundary problems exist under Rule 23 as it stands.

(2) the financial resources of the defendant or reasonably prospective defendants, including insurance, are such that there is substantial likelihood that judgments on behalf of the class, a "limited assets class," will exceed those resources and there is risk that payment of the claims will be inequitably distributed, and the validity of typical claims is established as provided in paragraph (c) of this Rule.

(b)(1) A consumer claim class suit, as defined in paragraph (a)(1), may be maintained as provided in this paragraph and Rule 23(d)-(f).

(2) The action shall be conditionally certified as a consumer claims action and notice as provided in Rule 23(d)(2) shall be given to the class.

(3) Pretrial proceedings, including discovery, shall be conducted with respect to the scope and scale of the claims considered as a whole, including issues of liability and damages, or such proportion of the claims as is reasonably indicative of the claims considered as a whole.

(4) The court shall identify a set of claims that the court determines to be reasonably typical of the class as a whole. The set shall consist of twenty-five (25) claims or such different number as the court may determine are reasonably typical. Pretrial proceedings, including discovery, shall be conducted with respect to those claims. Trial shall be held on that set of claims.

(5) If trial results in judgment for the defendant, the conditional class certification must be revoked. If the trial results in judgment for the plaintiff, the court must certify the proceeding as a class suit and direct further proceedings, including discovery if appropriate, to determine liability and damages to other members of the class. Principles of claim and issue preclusion shall be applied as appropriate.¹⁵

(c) A limited assets class suit, as defined in paragraph (a)(2), may be maintained as provided in this paragraph and Rule 23(d)-(f).

(1) The action shall be conditionally certified as a class suit and notice as provided in Rule 23(c)(2) shall be given to members of the class. Pretrial proceedings shall be conducted as provided in paragraph (b)(2) of this Rule. The court may issue an injunction in aid of its jurisdiction to restrain other proceedings that would interfere with administration of the class proceeding.

(2) The court shall identify a set of claims that the court determines to be reasonably typical of the class as a whole. The set shall consist of ten (10) claims or such different number as the court may determine are reasonably typical. Trial shall be held on that set of claims.

(3) If a preponderance of the trials results in judgments for the defendant, the class proceeding must be decertified. If a preponderance of the trials results in judgments for the plaintiffs, the court shall certify the proceeding as a class suit and direct further proceedings, including discovery, to determine liability and damages with respect to other members of the class. Principles of claim and issue preclusion shall be applied as appropriate.

(4) To determine allocation of the limited assets among the claims of

15. Cf. Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 147-52 (1984) (describing claim and issue preclusion).

members of the class, the court may exercise its inherent powers as a court of equity or direct initiation of a proceeding under 28 U.S.C. § 1334 or § 1335.

Obviously, the basic concept in this proposal is to have a judgment indicative of the merits of the class claims before proceeding to full-fledged certification, what I have called "verdict value." The verdict value of the claims may be susceptible to estimation on the basis of judgments in prior individual actions. Otherwise, there seems to be no way to establish whether a proposed class suit has verdict value—and the general range of that value—without having a trial on the merits of some of the claims.

Various procedures can be envisioned that would approximate such a valuation. Examples include arbitration, a hearing and recommendation by a special master, or a "mini trial." Naturally, the parties always have the opportunity to fix the value by agreement through settlement. However, the legal system's method of conclusively determining the value of a legal claim is to conduct a trial. All alternatives to that method are artificial to some degree and correspondingly limited in their validity.

It will be noted that the proposal eliminates the requirement of individual notice in consumer class suits. As indicated below, it seems to me absurd to require individual notice in a type of case in which, by hypothesis, prosecution by individual actions would be a practical impossibility. The proposal also bypasses one recently discussed idea about Rule 23: the notion that some class suits involve such small stakes that they "just ain't worth it." This category seems to me illusory. A class claim involving even less than a dollar per capita would be a valid basis for a disgorgement remedy if liability were clear and the number of valid claims were sufficient to warrant judicial inquiry.

Concerning mass torts involving individual claims of larger magnitude than consumer claims, the proposal would authorize litigation class suits—as distinct from settlement class suits—only when a limited fund is involved. However, the proposed rule would more fully explicate the definition of limited fund in the context of damages claims.

IV. *EISEN V. CARLISLE & JACQUELINE*

Those familiar with class suit procedure are aware that a procedure approximating a trial was undertaken by the district court in the *Eisen* case, in connection with the problem of giving notice to the class.¹⁶ The *Eisen* case also pioneered judicial interpretation of many other provisions of then newly-adopted Rule 23.¹⁷ The primary holding in *Eisen* was that a preliminary

16. *Eisen*, 417 U.S. at 166-67.

17. Revised Rule 23 went into effect in 1966. The complaint in *Eisen* was filed on May 2, 1966. See *id.*, 417 U.S. at 159.

determination of the merits was improper.¹⁸ Evidently, many district courts have nevertheless undertaken some exploration of merits prior to class certification.¹⁹ However, a negative attitude toward such inquiry and others related to it remain the framework of contemporary Rule 23 proceedings.

In *Eisen*, the class claim was on behalf of six million claimants, most of them having a claim of hundreds of dollars or less, against “odd-lot” traders in securities.²⁰ The legal basis of the claim was an alleged conspiracy among the defendants to fix the price of their commissions in executing odd-lot trades.²¹ After extended pretrial proceedings and two interlocutory appeals to the Second Circuit, all dealing with other issues, the court of appeals remanded the problem of notice to the trial court.²² At that stage, Harold Tyler, a very able lawyer then on the district court bench, was concerned about the feasibility and cost of giving notice to the hundreds of thousands of class members, people who had traded in odd lots on the stock exchange over the class period.²³ Rule 23 literally required individual notice to each reasonably identifiable prospective claimant in a (b)(3) case.²⁴ Judge Tyler was also concerned about the fairness of allocating the cost of notification to the plaintiffs.²⁵ He recognized that if the class claims had merit, the expenditure in giving notice would be worthwhile, but if the claims lacked merit, the cost would be wasteful.²⁶ He also thought that if the claims had merit, it would be fair, certainly at least reasonable, to impose the cost on the stockbrokers who caused the liability rather than on the customers who suffered it.²⁷

Accordingly, Judge Tyler held a preliminary hearing to inquire into the merits as a predicate for dealing with the notice problems.²⁸ A finding on the basis of the hearing would not preempt a trial on the merits because it was a predicate only for the procedure of giving notice. Obviously, the hearing could be a strong forecast of the ultimate decision that might be rendered on the merits. The facts of the underlying transactions were not subject to serious dispute because the issue on the merits was essentially a question of antitrust law.

The Supreme Court held that individual notice to each class member was required, that there was no basis for making a preliminary determination

18. *Id.* at 177.

19. See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 105-07 (1996).

20. *Eisen*, 417 U.S. at 160-61, 166.

21. *Id.* at 160.

22. *Id.* at 161-65.

23. *Id.* at 160; *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 265, 269 (S.D.N.Y. 1971).

24. See FED. R. CIV. P. 23(b)(3), (c)(2).

25. *Eisen*, 52 F.R.D. at 269-70.

26. *Id.* at 271.

27. *Id.* at 270.

28. *Id.* at 272.

concerning the merits in order to allocate the cost of notice, and that imposing the cost of notice on defendants was in error.²⁹ These determinations were warranted by, although not compelled by, the language of Rule 23. In a later decision, the Court stated that, generally, a plaintiff must pay the cost of identifying members of the class.³⁰

However, that does not mean these rulings are sound legal concepts. The question of cost I will leave to another day. Nevertheless, it may be noted that there is nothing alien or inherently wrong with the idea that an "innocent party" must pay the cost of notice in litigation that concerns his behavior. Consider, for example, notice to creditors and beneficiaries published by the administrator or executor of a decedent's estate, the cost of which is ultimately placed upon the estate. Moreover, it may also be noted that under the current rules of ethics, although the rules have been amended since *Eisen* was decided, it is proper for plaintiffs' counsel—as distinct from plaintiffs themselves—to pay the cost of notice.³¹ Also, given the changes in financial resources now available to plaintiffs' counsel, imposing the cost on plaintiffs' counsel will not inhibit class suits, although it may channel them to the "repeat player" plaintiffs' counsel.

Concerning the requirement of notice to all class members, the Court said: "Rule 23(c)(2) provides that, . . . each class member shall be advised that he has the right to exclude himself from the action. . . . We think the import of this language . . . [requires that] [i]ndividual notice must be sent to all class members"³² In this connection, the *Eisen* Court made extended reference to *Mullane v. Central Hanover Bank & Trust Co.*³³ The plain implication of this discussion of *Mullane* was that notice to all members of a class is not merely a requirement of Rule 23, but one of constitutional dimension.³⁴

With all due respect, in my opinion, the Court grossly over-read *Mullane*. Without going into a detailed analysis, suffice to say that all kinds of proceedings, including the common trust accounting involved in *Mullane*, have countenanced less than notice to each individual who might have a claim. Consider, for ready example, bankruptcy proceedings. No one would say that a bankruptcy proceeding cannot go forward if one or another creditor cannot be given individual notice. Moreover, the Court itself recognized in *Mullane* that notice to many members of a large group would be sufficient

29. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

30. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356, 364 (1978).

31. See MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2001); cf. *Rand v. Monsanto Co.*, 926 F.2d 596, 598, 601 (7th Cir. 1991) (discussing the ethics rule as applied by the Supreme Court in *Eisen* and holding "that a district court may not establish a *per se* rule that the representative plaintiff must be willing to bear all (as opposed to a pro rata share) of the costs of the action").

32. *Eisen*, 417 U.S. at 173.

33. 339 U.S. 306 (1950); see *Eisen*, 417 U.S. at 174-75.

34. *Eisen*, 417 U.S. at 174.

notice to all members, on the theory that some of them would be energized to come forward.³⁵ In any event, if such notice is constitutionally required to bar a claimant in a class suit, the appropriate rule can simply be that claimants not so notified are not barred. Their claims will simply expire with the statute of limitations.

Concerning a preliminary determination of the merits as a basis for allocating the cost of notice, the Court stated:

[N]othing in . . . Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure . . . [allows] a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. . . . Additionally, . . . a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials.³⁶

V. THE "PHILOSOPHY" OF *EISEN*

As mentioned above, the Court's readings of Rule 23 as it stood, and still remains, are justifiable. However, they do not go to the essence of a class suit, that is, what a class suit might be if Rule 23 were amended. Nothing inherent in a class suit requires that notice be given individually to all members of a class before the suit is certified as a class action.³⁷ In fact, the Court itself has made it plain that a class suit determination can subsequently be challenged by an affected, but absent, party.³⁸ Additionally, nothing inherent in a class suit prevents discovery prior to certification concerning the merits of the claims or the scope and scale of the class.

Finally, nothing inherent in a class suit would prevent a determination of merits of some of the claims before addressing the problem of certification. Indeed, the well-known decision by Judge Posner in *In re Rhone-Poulenc Rorer Inc.*³⁹ suggests that such a determination is highly relevant to certification. In *Rhone-Poulenc*, the trial court certified a class for claims of contamination of blood plasma given to patients without proper precautions concerning the AIDS virus.⁴⁰ Hundreds of such cases had been filed individually, and many were still pending.⁴¹ Thirteen of these had gone

35. *Mullane*, 339 U.S. at 317-19.

36. *Eisen*, 417 U.S. at 177-78.

37. *Cf.* *Cartt v. Superior Court*, 124 Cal. Rptr. 376, 381 (Cal. Ct. App. 1975) ("Neither due process nor the integrity of the class action demands such useless and wasteful procedures" when notifying "as many as half" of the potential class members "is an idle act.").

38. *See* *Martin v. Wilks*, 490 U.S. 755, 758-59, 765, 768 (1989).

39. 51 F.3d 1293 (7th Cir. 1995).

40. *Id.* at 1294-95.

41. *Id.* at 1296.

through trial, and “defendants ha[d] won twelve of them.”⁴² Much of Judge Posner’s opinion does not need to be repeated here. It should be noted that prior verdicts are not necessarily an accurate indicator of claim value. In the blood plasma situation, for example, many claims had been settled for substantial sums, indicating recognition that the claims had significant value. Suffice to say that, given the large number of claims, the large potential amount of each claim, and the fact that twelve of thirteen verdicts were for the defendants, it could have been grossly unfair to expose defendants to a single trial on the issue of liability. As Judge Posner said, “[Defendants] might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. . . . They will be under intense pressure to settle. . . . Judge Friendly . . . called settlements induced by a small probability of an immense judgment in a class action ‘blackmail settlements.’”⁴³

Such settlements are properly called “blackmail.” But what if there is a *high* probability of an immense judgment, as there would have been if plaintiffs in the blood plasma cases had won twelve of the thirteen verdicts? In that case, the “verdict values” would have been established as being in the range of multi-millions, perhaps billions, of dollars. Moreover, in that circumstance, the rule of offensive issue preclusion could be validly applied in favor of many if not all of the class claims.⁴⁴

It seems worth remarking that the Supreme Court’s opinion in *Eisen* made a number of other disparaging remarks about the plaintiff’s claim and the litigation that had ensued.⁴⁵ The ideas expressed in these remarks still have some relevancy today. I have the greatest respect and affection for Justice Powell, who wrote the opinion.⁴⁶ However, in my estimate these remarks were unwarranted and misguided.

For example, the Court indicated that the lower courts’ proceedings were “labyrinthian,” having taken six and a half years, only to arrive at the district court’s original conclusion that the suit should not proceed as a class action.⁴⁷ It is important to note that there has since been another thirty years of class suit jurisprudence, and the courts, including the Supreme Court, have still not clearly determined when class suits properly may be maintained.⁴⁸

Additionally, the Court adopted a disparaging comment by Judge Lumbard, one of the appellate court judges, calling the proceeding “a

42. *Id.*

43. *Id.* at 1298.

44. See generally *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (discussing offensive issue preclusion).

45. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

46. *Id.* at 159.

47. *Id.* at 161.

48. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

'Frankenstein monster posing as a class action.'"⁴⁹ However, mass wrongs, such as those involved in *Eisen*, are themselves monsters, as defined in the dictionary—"enormous in size, extent, or numbers" or of "unnatural or extreme ugliness."⁵⁰ The problem is not whether the underlying mass torts are unattractive, but how the legal system should cope with them.

The Court also commented that the claim of the individual representative was "only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount."⁵¹ However, that is what consumer class actions are all about. The "private toll booth" run by the odd-lot dealers was lucrative in part precisely because the victims could do nothing about it except through a class suit.

Finally, the Court described the district court's proposal that the recovery be distributed through a "fluid class," since matching the losses with specific victims was going to be difficult, as an "expedient."⁵² However, there is justice in the idea that a wrongdoer disgorge ill-gotten gains, even if there is no obvious recipient.⁵³

VI. CONCLUSION

The class suit is, or should be, here to stay. The injunction class suit has a long provenance and, particularly in the civil rights field, a very positive modern history. The damages class suit is more controversial. A damages class suit does indeed sometimes project the specter of bankruptcy, as in the asbestos cases and perhaps the tobacco litigation. Why is that wrong if, indeed, the defendants in those cases have committed wrongs of "unnatural ugliness"? The proper issue is not whether defendants might go bankrupt, but whether they deserve to do so. In the class suit context, this depends on the merits of the claims involved.

49. *Eisen*, 417 U.S. at 169 (quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968)).

50. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 769 (1990).

51. *Eisen*, 417 U.S. at 161.

52. *Id.* at 166.

53. See RESTATEMENT (THIRD) OF RESTITUTION § 1 (Tentative Draft No. 2, 2001).

